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No. 387

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In the Supreme Court of the United States

OCTOBER TERM, 1961

PHILIP J. KHURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Regulation Involved	1
Statement	4
Argument	6
Conclusion	10

CITATIONS

Cases:

Greene v. *McElroy*, 360 U.S. 474	9, 10
Service v. *Dulles*, 354 U.S. 363	8
United States v. *Shaughnessy*, 347 U.S. 260	8
Vitarelli v. *Seaton*, 359 U.S. 535	8

Statutes and Regulations:

5 U.S.C. 151(c)	7
22 U.S.C. 811(a)	7
22 U.S.C. 1007	6, 10
22 U.S.C. 1008	10
22 U.S.C. 1027	7, 9
22 U.S.C. 1028	6, 9

Department of State Regulations (1 F.S.M. Part IV):

Section 700	9
Section 911	6
Section 918.5	2, 4, 5, 7
Section 918.8	2, 6, 7
Section 918.81	2, 8
Section 918.82	3, 8
Section 918.83	3, 8
Section 918.83a	3, 9
Section 918.83b	3
Section 918.83c	4, 9
Section 918.83d	4, 9
Section 918.83e	4

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OPINION BELOW

The opinion of the Court of Claims (Pet. 1A-9A) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 7, 1961 (Pet. 9A). The petition for a writ of certiorari was filed on September 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner's separation from employment because of participation in visa frauds violated any procedural rights given him by Department of State regulations.

REGULATION INVOLVED

The Foreign Service Manual of the Department of State (1 F.S.M. Part IV) provides in relevant part as follows:

> 918.5 *Separation for Cause*
>
> Local employees may be separated for malfeasance, misconduct, or for unsatisfactory performance of their duties under such rules as the Foreign Service post may prescribe. The policy of the Department and of the Foreign Service is to protect its employees against arbitrary separation for reasons not related to the good of the Service. Employees are required, however, to render honest, efficient, and loyal service, and shall be separated or removed when necessary to maintain the required discipline and efficiency of the Service.
>
> * * * *
>
> 918.8 *Fair Process Rule in Separation of Local Employees*
>
> 918.81 Foreign Service posts, in exercising their authority to make rules relating to separation, should attempt to make procedural rules consistent with the principles of procedural justice in the local area. Good personnel practice and the need to gain favorable publicity for the Foreign Service as an employer demand that the

maximum procedural fairness be followed in separating local employees.

918.82 Despite the necessity for fairness and conformance with local custom, a post should never permit agencies outside the Foreign Service to play any part in the separation process, and it should be understood as one of the terms of employment that no local or other outside authority has local jurisdiction over the employment conditions affecting local employees of the post, as well as the fact that local laws and regulations relating to employment, social security, or other phases of labor protection do not govern the United States Foreign Service employment system. This does not, however, affect the general policy of the Foreign Service to adhere, as closely as pertinent United States laws and regulations will allow, to local laws, customs, and practices with respect to employment conditions and prevailing wages in the locality in which each post is located; nor does it relieve Foreign Service posts from their moral responsibility to refrain from arbitrary action, whenever possible, in the interests of the Government and the Foreign Service.

918.83 Good procedural practice in administration of the separation process should give the employee who is to be separated the following privileges:

a. The right to participate in the process in a language intelligible to the employee.
b. The right to be informed of the charges against him or the reasons for his separation, except in cases in which adverse security information is the cause.

c. The right to receive notice of shortcomings prior to separation and to have an opportunity to overcome such shortcomings.
d. The right to appeal to some person other than the one who brings the charges.
e. A formal hearing at the post in the case of separation for cause, if the employee so desires. For use as a guide, see 1 FSM IV 700 which outlines the procedures for separation of American employees of the Foreign Service.

STATEMENT

Petitioner is a non-resident alien and a citizen of Lebanon who was dismissed from his employment in the visa office of the United States Embassy, Beirut, Lebanon for participation in visa frauds. The dismissal took place pursuant to § 918.5 of the Foreign Service Manual (1 F.S.M., Part IV), which provides for separation of local employees for malfeasance, misconduct, or for unsatisfactory performance of duty "under such rules as the Foreign Service post may prescribe."

The essential facts are undisputed. Petitioner was employed as chief visa clerk in the visa office of the American Consulate, Beirut, Lebanon. He was responsible for maintaining the visa quota registration lists which determine the relative priority of a prospective immigrant for an immigration visa to enter the United States under the quota system. In December 1956, as a result of an investigation into visa fraud rings suspected to exist in Beirut, petitioner

and three other employees were separately called for questioning before a panel appointed by the United States Ambassador to Lebanon. The panel consisted of the Consul, Vice Consul, Personnel Officer and Chief Investigator for Regional Security. Petitioner was informed of the nature of the investigation and of his suspected implication.[1] Statements made by informants and witnesses were read to him, although their authors were not identified because it was feared that to have done so would have resulted in their being murdered or in having their future usefulness as informants impaired. Petitioner, however, was given an opportunity to make an explanation and he was advised that on the following day he would be able to make a further statement to the panel. The session lasted for approximately forty-five minutes. The next day petitioner tendered no further explanation; however, he denied the charges and insisted on the right to confront his accusers (Pet. 1A-2A).

All of the members of the panel agreed that there was sufficient evidence to justify petitioner's dismissal and, as a consequence, on the day following his second appearance before the panel, petitioner was separated from his employment in accordance with § 918.5 of the Manual, *supra*. Petitioner appealed his dismissal to the American Ambassador who referred his file to the State Department in Washington for an independent determination. The

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[1] The procedure followed with the three other employees was essentially the same.

State Department affirmed the dismissal. Thereafter, petitioner appealed his decision to the Foreign Service Inspector who made an independent determination and concluded that the evidence warranted petitioner's dismissal (Pet. 3A).

On November 10, 1959, petitioner instituted this action in the Court of Claims to recover back pay from December 20, 1956, the date of his dismissal, claiming that his separation was invalid because he had been denied separation procedures to which he allegedly was entitled under § 918.8 of the Foreign Service Manual (Pet. 3A). The Court of Claims granted summary judgment dismissing the petition, holding that § 918.8 of the Manual did not afford petitioner the right to any separation procedures and that, even if it did, the procedures actually followed in this case were in accord with that section (Pet. 1A-9A).

ARGUMENT

Congress has directed the Secretary of State to separate from Foreign Service employment local employees—*i.e.*, personnel employed at Foreign Service posts who are not citizens of the United States (1 FSM Part IV, § 911)—who are guilty of misconduct or malfeasance. 22 U.S.C. 1028. Unlike Foreign Service officers, however, who are entitled to a hearing before the Foreign Service Board, 22 U.S.C. 1007 and 1008, Congress did not require a particular procedure to be followed in separating local employees but left that procedure to the discretion of the Secretary of State. The issue that is here presented is

whether the Secretary of State has by regulation created legally enforceable procedural rights for the benefit of local employees with which the Department did not comply in dismissing petitioner from employment. The Court of Claims held that such rights had not been created by the section of the Manual relied upon (§ 918.8) and that, in any event, the procedure followed comported with the language of that section. That decision is clearly correct and is in no way inconsistent or in conflict with decisions of this Court. Review is not warranted.

1. Petitioner was dismissed from employment pursuant to § 918.5 of the Foreign Service Manual promulgated by the Secretary of State[2] to govern local employee personnel administration. That section delegates to local Foreign Service posts[3] authority to separate local employees who are guilty of misconduct or malfeasance "under such rules as the Foreign Service post may prescribe." Petitioner asserts that superimposed upon this delegation of authority are mandatory procedural rights prescribed in § 918.8 by the Secretary of State for the benefit of local employees.

Section 918.8 is not, however, for the benefit of the local alien employee; on the contrary, it is hortatory in nature, confirms that separation procedures

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[2] The Secretary's regulatory authority is based upon 5 U.S.C. 151(c) and 22 U.S.C. 1027.

[3] Under 22 U.S.C. 811(a) the Secretary of State is to administer the Foreign Service and for that purpose he is authorized to delegate authority.

are to be locally evolved, and is merely advisory to the Foreign Service posts, with emphasis placed upon paramount interest of the Government and the Foreign Service. Thus § 918.81 calls for fairness of separation procedures not because it is a right of the employee but because of "[g]ood personnel practice and the need to gain favorable publicity for the Foreign Service as an employer." The Foreign Service post has a "moral" obligation to refrain from arbitrary action but only "whenever possible, in the interests of the Government and the Foreign Service" (§ 918.82). The employee is not accorded "rights" but the local post is advised that it "should attempt" to make fair procedural rules "consistent with the principles of procedural justice in the local area" (§ 918.81). The permissive and advisory character of that section makes it an unsubstantial basis for petitioner's claim of procedural irregularities in his separation.[4]

2. Moreover, petitioner had the benefit of the "good procedural practice" recommended by the Secretary in § 918.83. He was informed of the charges against

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[4] The decision below plainly does not, as claimed (Pet. 5), conflict with decisions of this Court. *Service* v. *Dulles*, 354 U.S. 363, 372 and *Vitarelli* v. *Seaton*, 359 U.S. 535, 538 (Pet. 5), held that the removing authority in personnel actions is bound by the procedures set forth in applicable regulations. As we have shown, however, petitioner here was granted no procedural rights and the separation procedure followed was, moreover, in accord with the advisory regulation upon which he relies. *United States* v. *Shaughnessy*, 347 U.S. 260, is patently inapposite to the question presented by this case.

him (§ 918.83(c)), and given an opportunity to make an explanation at a hearing (§ 918.83(c)) in which he participated in a language intelligible to him (§ 918.83(a)).[5] Additionally, he was allowed an appeal to persons other than the ones who conducted the hearing (§ 918.83(d)).

Petitioner asserts, however, that the hearing afforded him was defective because he did not have an opportunity to confront and cross-examine the informants and witnesses who made statements adverse to him (Pet. 6). The Secretary's regulations, however, do not provide for confrontation and cross-examination. *Greene* v. *McElroy*, 360 U.S. 474, 496, cited by petitioner in support of his claim (Pet. 6), is not in point. That case held only that the Department of Defense industrial security regulations were not authorized by statute. No claim is made here of a lack of statutory authorization,[6] and the

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[5] Section 918.83(c) recommends a "formal hearing" but does not specify its elements. Although it suggests as a "guide" the procedures followed with respect to separation of American employees (§ 700), that is in no sense mandatory. If it were, as the Court of Claims noted, there would be no necessity for two sets of regulations, one for alien employees and another for Americans.

[6] 22 U.S.C. 1027 and 1028 govern the dismissal of alien employees. Section 1027 provides generally that the "Secretary may, under such regulations as he may prescribe, separate from the Service any alien clerk or employee on account of the unsatisfactory performance of his duties," while § 1028 specifically directs that the Secretary "shall" separate any alien employee guilty of misconduct. That those provisions leave to the Secretary's discretion the procedures to be followed in dismissing alien employees is

Greene case has no bearing on petitioner's claim that he has been denied a right given him by the regulations.

Finally, the decision not to allow petitioner to confront and cross-examine the government's informants and witnesses was not arbitrary. In the judgment of the responsible officials to have permitted confrontation might have led to the murder of the witness or the impairment of the usefulness of the government's informants.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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emphasized by the contrast between them and the provisions governing Foreign Service officers, which, although otherwise similar, qualify the Secretary's discretion in such cases by adding: "but no such officer shall be so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service * * * " (22 U.S.C. 1007(a) and 1008(a)).

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